In the

Supreme Court of the United States

October Term, 1959

No. 733

HARRY R. THOMAS, EXECUTOR,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

BRIEF ON BEHALF OF THE RESPONDENT

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PRELIMINARY STATEMENT

On November 20, 1958, pursuant to the provisions of Section 58-182 et seq. of the Code of Virginia (1950), the petitioner filed in the Circuit Court of Arlington County, Virginia, his application for relief from an allegedly erroneous inheritance tax assesment made by the Virginia Department of Taxation against the petitioner as executor of the estate of one Crandal Mackey. On June 29, 1959, the Circuit Court of Arlington County entered its order denying the application for relief and ordering the petitioner to pay the assessment in question. A petition for a writ of error to review this order of the Circuit Court of Arlington County was refused by the Supreme Court of Appeals of Virginia on November 27, 1959, and this Court granted certiorari on April 4, 1960.

STATEMENT OF FACTS

Crandal Mackey, a resident and domiciliary of Arlington County, Virginia, died testate in that county on March 31, 1957. His will was admitted to probate in the Circuit Court of Arlington County on April 9, 1957, and petitioner qualified as executor thereunder before the clerk of that court on the same day.

One of the assets of Mackey's estate was $263,100 in paper money of the United States, which was owned by Mackey and located at the time of his death in a safe deposit box registered to him in the Second National Bank in the District of Columbia. The Commonwealth of Virginia included this sum in Mackey's estate for inheritance tax purposes and assessed an inheritance tax upon its transfer by will. The District of Columbia also included this sum in its assessment of inheritance taxes upon Mackey's estate. Petitioner paid the tax imposed by the District of Columbia and instituted this action to obtain exoneration from the tax imposed by the Commonwealth of Virginia.

THE STATUTE

The inheritance tax under consideration in the case at bar was imposed by the Commonwealth of Virginia pursuant to the provisions of Section 58-152, Code of Virginia (1950) which, in pertinent part, provides:

> "State inheritance taxes as hereinafter prescribed are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this Commonwealth, real, personal and mixed, and any interest therein, which shall pass:
>
> "(1) By will or by the laws regulating descents and distributions:
>
> * * *

As stated by the Supreme Court of Appeals in Virginia in *Commonwealth* v. *Morris*, 196 Va. 868, 877, 86 S. E. (2d) 135, the above quoted statute:

> "... lays the inheritance tax on the shares of beneficiaries of property 'within the jurisdiction of this Commonwealth.' Property may be in this jurisdiction either actually or constructively. It is here actually when it is physically present. It is here constructively when it is intangible personal property which has not acquired a tax situs elsewhere by reason of its use and its owner is domiciled here."

For tax purposes, money is declared to be intangible personal property by Section 58-408 of the Code of Virginia (1950) which, in pertinent part, prescribes:

* * *

> "(4) Money in the possession or under the control of the owner, whether such money be actually in or out of this State and belonging to a resident of this State.
>
> * * *
>
> "Shall be deemed to be intangible personal property."

* * *

QUESTION PRESENTED

Does the Fourteenth Amendment to the Constitution of the United States prohibit the State in which an individual is domiciled at the time of his death from imposing an inheritance tax upon the transfer, under decedent's will, of paper money of the United States belonging to decedent and kept by him in a safe deposit box located outside the State of his domicile?

ARGUMENT

I.

The Fourteenth Amendment to the Constitution of the United States Does Not Prohibit the Commonwealth of Virginia from Imposing an Inheritance Tax Upon the Transfer by Will of Paper Money of the United States Owned by a Domiciliary of Virginia and Kept by Him in a Safe Deposit Box in the District of Columbia.

In *Frick* v. *Pennsylvania*, 268 U. S. 473, this Court held that a State in which an individual is domiciled at the time of his death may not constitutionally tax the transfer of the decedent's tangible personal property which has an actual situs in other States. In that case, this Court declared a Pennsylvania statute to be in contravention of the "due process" clause of the Fourteenth Amendment and invalid to the extent that it attempted to tax the transfer of tangible personal property belonging to a citizen of Pennsylvania but having an actual situs in New York and Massachusetts. The tangible personal property under consideration in the *Frick* case consisted of *paintings, rugs, furniture, bronzes, procelains, household furnishings, tools, farm implements* and *automobiles*.

In *Blodgett* v. *Silberman*, 277 U. S. 1, this Court held that a State in which an individual is domiciled at the time of his death may constitutionally tax the transfer of decedent's intangible personal property even though the evidences of such property are located outside the taxing State at the time of death. The intangible personal property under consideration in the *Blodgett* case consisted of an interest in a partnership, certificates of stock, bonds and Treasury certificates of indebtedness of the United States, a bank account and a life insurance policy.

This Court's decision in the *Blodgett* case reversed that of the Supreme Court of Errors of Connecticut with respect to the nature and taxability of the bonds and

Treasury certificates of indebtedness there involved. The Supreme Court of Errors of Connecticut had ruled that such bonds and certificates of indebtedness "were to be regarded as in the same class of tangibles as the paintings, works of art and furniture considered" in the *Frick* case, and were thus not taxable by Connecticut since they had been kept by decedent in a safe deposit box in New York. *Blodgett v. Silberman, supra* at 6. In support of the view of the Supreme Court of Errors of Connecticut, this Court noted (277 U. S. at 13):

> "The argument is that such bonds payable to bearer and transferable from hand to hand have lost their character as choses in action and have taken on the qualities of physical property, and cases are cited to indicate that they can be made the subject of execution and constitute a basis for the jurisdiction of the courts and of taxing officers of the state in which the paper upon which the evidence of the debt or obligation is written is found, although their owner lives and dies in another state."

Rejecting this argument and the decision of the Supreme Court of Errors of Connecticut predicated upon it, this Court declared (277 U. S. at 14, 17):

> "The question here is whether bonds, unlike other choses in action, may have a situs different from the owner's domicile such as will render their transfer taxable in the state of that situs, and in only that state. ***We think bonds are not thus distinguishable from other choses in action.*** It is not enough to show that the written or printed evidence of ownership may, by the law of the state in which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so

treated, *they are nevertheless in their essence only evidences of debt.* (Italics supplied)

* * *

"The discussion in the Union Refrigerator Transit Co. Case shows what this court meant in the Frick Case in holding that personal property in the form of paintings and furniture having an actual situs in one state could not be subjected to a transfer tax in another state and emphasizes the inference that *it did not apply to anything having as its essence an indebtedness or a chose in action* and *could not apply to* property in the form of specialties or bonds or other *written evidences of indebtedness whether governmental or otherwise, even though they passed from hand to hand.* The analogy between furniture and bonds cannot be complete because bonds *are representative only* and *are not the thing represented. They are at most choses in action and intangibles.*

"We think therefore that the supreme court of errors in extending the rule of the Frick Case *from tangible personal property, like paintings, furniture or cattle, to bonds,* is not warranted, and to that extent we must reverse its conclusion in denying to Connecticut the right to tax the transfer of the bonds and Treasury certificates." (Italics supplied)

Having thus resolved the principal question presented in the *Blodgett* case, this Court—in the concluding paragraph of its opinion involving the reach of the Connecticut taxing statute—stated (277 U. S. at 18):

"There was a small amount of cash, $287.48, in bank notes and coin in a safe deposit box in New York which the supreme court of errors held not taxable in Connecticut. As to this, the contention on behalf of Connecticut is that it should be treated as attached to the person of the owner and subject to a transfer tax at the domicile. It is argued that it was not like coin or

> treasure in bulk, but like loose change, so to speak. To money of this amount usually and easily carried on the person, it is said that the doctrine of 'mobilia sequuntur personam' has peculiar application in the historical derivation of the maxim. But we think that money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the Frick Case to be taxable only in the jurisdiction where they were."

The language of this Court quoted immediately above constitutes the sole support of the petitioner's position in the case at bar. Were it not for this language, the instant case would not have arisen. It would, therefore, seem appropriate to analyze this isolated paragraph in as much detail as its meager content will permit.

Initially, it should be noted that the total amount of money there involved was $287.48 comprised of bank notes *and coin*. The only reference to bank notes or paper money is that contained in the opening sentence of the paragraph. Thereafter, the Court noted Connecticut's contention that so small a sum of money was not like *coin* or *treasure* in bulk, but should more appropriately be considered similar to *loose change* usually and easily carried on the person. No consideration was given to the nature of the bank notes involved or to the essential character of paper money. In rejecting Connecticut's argument that the maxim *mobilia sequuntur personam* should apply with special emphasis to money of this amount, the Court merely stated that it thought that money "so definitely fixed and separated in its actual situs from the person of the owner as this was" could not be distinguished from such tangible personal property as paintings and furniture. As Mr. Justice Stone—who sat in the *Blodgett* case—was later to point out, this

statement of the Court was a completely reasonless observation.

What is paper money? The Court did not even purport to consider this question in *Blodgett*, and it remains to be considered here. The question is not a difficult one. Paper money is promissory notes of the United States Government. Indeed, paper money is called just that, i.e., bank *notes*, and was so called by this Court in the *Blodgett* case. Essentially, paper money is evidence of an obligation or promise on the part of the government of the United States to pay a sum certain to the bearer on demand.

At the present time, paper money is issued in the form of (1) Gold Certificates, issued only to Federal Reserve banks against credits with the Treasurer of the United States and not appearing in circulation; (2) Silver Certificates, issued by the Treasurer against any standard silver dollars, silver, or silver bullion held in the Treasury against which silver certificates are not already outstanding; (3) United States Notes and (4) Federal Reserve Notes. Silver Certificates and Federal Reserve Notes constitute the principal types of paper currency presently in circulation.

The inscription upon the face of a Silver Certificate recites:

> *"This certifies that there is on deposit in the Treasury of the United States of America ..... Dollars in silver payable to the bearer on demand."*

Similarly, the inscription upon the face of a Federal Reserve Note recites:

> *"The United States of America will pay to the bearer on demand ..... dollars.*

"This note is legal tender for all debts, public and private, and is redeemable in lawful money at the United States Treasury, or at any Federal Reserve Bank."

When the fundamental nature of paper money is considered, it is immediately apparent that this Court's observations concerning bonds and Treasury certificates of indebtedness in *Blodgett* are equally applicable to paper money. Silver certificates and Federal Reserve Notes—like bonds and Treasury certificates of indebtedness—are "in their essence only evidences of debt." Id. at 14. The rule of the *Frick* case cannot possibly apply to paper money because this Court flatly stated in *Blodgett* that the holding in the *Frick* case "could not apply to . . . written evidences of indebtedness whether governmental or otherwise, even though they passed from hand to hand." Id. at 17. Similarly—to paraphrase this Court's assertion concerning bonds—the "analogy between furniture and [paper money] cannot be complete because [bank notes] are representative only and are not the thing represented." Bank notes—like bonds and Treasury certificates of indebtedness—are "at most choses in action and intangibles." Id. at 17.

If, as stated by this Court in *Blodgett*, extension of the rule of the *Frick* case "from tangible personal property like paintings, furniture or cattle, to bonds, is not warranted," it is manifest that extension of the *Frick* rule to paper money is equally inappropriate. The validity of this proposition was clearly demonstrated in *Pearson* v. *McGraw*, 308 U. S. 313. In that case the decedent, a resident of Oregon, had placed various stocks, bonds and other intangibles in the possession of an Illinois trust company under an agency arrangement before moving to Oregon. Having established a domicile in the latter State, he directed the trust company to liquidate certain of his bonds and purchase $450,000

of federal reserve notes to be held for him by the trust company in Illinois. After these instructions had been carried out, decedent transferred the federal reserve notes to the trust company under an irrevocable trust agreement executed in Oregon for the benefit of certain designated relatives of the decedent. From time to time thereafter, the Illinois trust company used the federal reserve notes to purchase bonds and other personal property for the account of the trust.

Upon decedent's death in that State, Oregon imposed a tax upon the transfer of the federal reserve notes in question. The Supreme Court of Oregon "in reliance on *Blodgett* v. *Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410, concluded that the federal reserve notes were tangibles" and that Oregon was, therefore, constitutionally prohibited from imposing a tax on their transfer. *Pearson* v. *McGraw*, *supra* at 16. This Court disagreed with that conclusion and sustained the Oregon tax upon the ground that the various steps taken by the decedent constituted an integrated and indivisible transaction, i.e., a transfer by decedent of intangibles in contemplation of death. Having rested its decision upon this ground, the Court pointed out that it "need not consider the nature of federal reserve notes," for their taxability as such and in isolation from the whole transaction was not in issue. *Pearson* v. *McGraw*, *supra* at 318.

Believing it inappropriate to dispose of the constitutional question presented in the *Pearson* case upon the ground selected by the majority, Mr. Justice Stone—who had previously sat in the *Blodgett* case—authored a separate concurring opinion in which he stated (308 U. S. at 319):

> "I concur in the judgment of reversal on the ground that *nothing in the Constitution prevents taxation by by Oregon of a gift by its citizen of federal reserve notes located elsewhere.*

"While I do not question that in the circumstances of this case a state could, if so advised, constitutionally tax its citizen for action taken for no other purpose than the evasion of its taxing statutes, no such question is, I think, presented by the record. Discussion of it seems at most to be academic and not to relieve us of the duty of deciding the only federal question which could by any possibility be said to be raised by the record, namely, *whether the Constitution precludes taxation of the gift of the bank notes merely because of the physical fact that they are located without the state.*

* * * *

"*As I am of opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes, as chattels were treated in Frick v. Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, 42 A.L.R. 316, *and as no reason has been advanced, even in Blodgett v. Silberman*, 277 U. S. 1, 18, 72 L. Ed. 749, 760, 48 S. Ct. 410, *for a different view*, cf. Baldwin v. Missouri, 281 U. S. 586, 591, 74 L. Ed. 1056, 1059, 50 S. Ct. 436, 72 A.L.R. 1303, the judgment should, I think, be reversed upon that ground rather than upon a theory of permissible legislation, of which apparently Oregon's tax laws do not avail.

"*Mr. Justice Frankfurter agrees with my views as to Oregon's power to tax these federal reserve notes*, but is of opinion that the record sustains the ground taken in the Court's opinion." (Italics supplied)

Counsel for petitioner point out that Mr. Justice Stone's opinion was dicta and was not material to the decision in the *Pearson* case. Counsel for the Commonwealth concede the accuracy of these observations, for neither statement constitutes an argument nor does either detract in any way from the propriety of the view which Mr. Justice Stone expressed and in which Mr. Justice Frankfurter concurred.

Counsel for petitioner also point out that Mr. Justice Stone's decision would place United States currency in the same category as promissory notes and certificates of stock. Since United States currency *is* promissory notes, it is difficult to conceive of a more appropriate category in which it could be placed. The alternative to placing United States paper money in the same category as United States bonds and Treasury certificates of indebtedness is to place it in the same category as furniture, clothing, cattle and farm implements.

Of course, no real choice between these alternatives actually exists, for United States paper money is indisputably intangible. Reference to various federal statutes relating to the three types of paper money currently in circulation, i.e., Silver Certificates, United States Notes and Federal Reserve Notes, conclusively establishes the representative and evidentiary character of paper money. With respect to Silver Certificates, 31 U.S.C.A. 405a prescribes:

> "The Secretary of the Treasury is authorized and directed to issue silver certificates in such denominations as he may from time to time prescribe in a face amount not less than the cost of all silver purchased under the authority of section 734a of this title, and such certificates shall be placed in actual circulation. There shall be maintained in the Treasury *as security for all silver certificates at the time outstanding an amount of silver in bullion and standard silver dollars of a monetary value equal to the face amount of such silver certificates.* All silver certificates shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, *and shall be redeemable on demand at the Treasury of the United States in standard silver dollars;* and the Secretary of the Treasury is authorized *to coin standard silver dollars for such redemption.* (Italics supplied).

Moreover, with regard to United States Notes, 31 U.S.C.A. 401, 402 and 731, in pertinent part, respectively provide:

> "United States notes shall be of such denominations, not less than $1, as the Secretary of the Treasury may prescribe, *shall not bear interest, shall be payable to bearer*, and shall be in such form as the Secretary may deem best." (Italics supplied).
>
> * * *
>
> "The amount of United States notes outstanding and to be used as a part of the circulating medium, shall not exceed the sum of $300,000,000, *which said sum shall appear in each monthly statement of the public debt*, and no part thereof shall be held or used as a reserve." (Italics supplied).
>
> * * *
>
> "*The faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest, known as United States notes*, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver." (Italics supplied).

Finally, 12 U.S.C.A. 411 authorizes the issuance of Federal Reserve Notes and defines their character in the following language:

> "Federal reserve notes, to be issued at the discretion of the Board of Governors of the Federal Reserve System for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are herby authorized. *The said notes shall be obligations of the United States* and shall be receivable by all na-

> tional and member banks and Federal reserve banks and for all taxes, customs, and other public dues. *They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve Bank.*" (Italics supplied).

So far as the principal question presented in the case at bar is concerned, the significance of the language italicized in the above quoted statutes cannot be too greatly emphasized and should not have to be labored. In light of this language, no one can deny that the certificates and notes constituting United States paper money are "in their essence only evidences of debt," are "representative only and are not the thing represented" and are "at most choses in action and intangibles." *Blodgett* v. *Silberman*, *supra*, at 14, 17. The validity of this conclusion is in no way affected by the manner in which paper money is stored or kept, or by the character of its repository. In this connection, counsel for petitioner request this Court to take judicial notice that a safe deposit box can only be opened by its owner, or someone authorized by him, with a key retained by the owner together with a key held by officials of the bank in which the safe deposit box is located. On this basis, counsel for petitioner assert that the United States currency in the case at bar could be controlled entirely by the owner of the box in the District of Columbia and was, therefore, "something real and tangible." Brief for the Petitioner, p. 7. Counsel for the Commonwealth submit that tangible personal property does not become intangible when it is placed in a safe deposit box, and it is certain that the intangible bonds and Treasury certificates of indebtedness under consideration in the *Blodgett* case did not become something real and tangible, even though they were kept in a safe deposit box located outside the taxing State.

In light of what has been said, it is unarguably manifest that the tax under consideration in the instant case was imposed—not upon gold bars, silver coins, jewels or other tangible property having a situs outside the Commonwealth of Virginia—but upon the transfer of a number of pieces of engraved paper having no intrinsic value, representing obligations of the United States and evidencing the indebtedness of the government of the United States to the bearer thereof. The transfer of such intangible property by will may clearly be taxed by the State in which the owner of the property was domiciled at the time of his death without infringing any provision of the Constitution of the United States. *Blodgett* v. *Silberman*, *supra*; *Baldwin* v. *Missouri*, 281 U. S. 586; *Curry* v. *McCanless*, 307 U. S. 357; cf., *Pearson* v. *McGraw*, *supra*.

CONCLUSION

For the foregoing reasons, counsel for the Commonwealth respectfully submit that the Fourteenth Amendment to the Constitution of the United States does not prohibit the Commonwealth of Virginia from imposing the inheritance tax under consideration upon the transfer by will of paper money of the United States owned by a domiciliary of Virginia and kept by him in a safe deposit box in the District of Columbia.

Respectfully submitted.

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